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TREATIES MADE OR WHICH SHALL BE MADE
UNDER THE AUTHORITY OF THE UNITED
STATES

BY JOSEPH WHITLA STINSON¹

IN 1778, the confederation of the United States of America came into existence by compact of the thirteen original colonies. By the articles of confederation the states severally and mutually pledged their faith to abide by the determination of the United States in Congress assembled in all questions that were thereby made subject to their deliberation and control. The authority of Congress included especially the power of "entering upon treaties and alliances," with the proviso that no treaty of commerce should be made whereby the legislative power of the respective states would suffer restraint in respect to the imposition of such imposts and duties upon foreigners as their own people were subject to or from prohibiting the exportation or importation of any species of goods or commodities whatsoever. This limitation upon the power of Congress to make treaties of commerce is reflected in early American treaties beginning with the treaties of Amity and Commerce with France of 1778,² and extending somewhat beyond the formation of the federal government under the constitution. The preamble of the Treaty of Commerce with France of 1778, Adams writes, "laid the cornerstone to our subsequent intercourse with foreign nations and was to the rest of mankind what the declaration of independence was to our internal government."³ There was no reciprocity of duties established by these treaties. Until 1815, we have in general but two classes of treaties made by the United States during this early period,—those with England in which none of the neutral rights are recognized; and those with the great powers of continental Europe, in which all the principal neutral doctrines are secured by specific stipulation.⁴ Until 1815, treaty control

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²The treaty of alliance with France of 1778 was concluded before the articles of confederation came into effect.

³Moore, *Prin. Am. Diplomacy* 107, 108.

⁴Lyman, *Diplomacy of the United States* 146.

of commerce rested in the almost universal modern arrangement and in the old diplomatic phrase of *gentis amicissimae*. Thereafter reciprocity of duties and tonnage charges on imports becomes the basis of commercial treaties.

"The law of March 3, 1815, is the ancestor of numerous subsequent laws which proposed to foreign nations terms of equality and reciprocity on duties upon the tonnage of vessels and the goods they carried to become effective by executive proclamation whenever the discriminations of such foreign nations operating to the disadvantage of the United States should be abolished."⁵

Some of these general laws remain unrepealed as section 4228 of the Revised Statutes. This brief survey shows the treaty-power, as first exercised, to have been characterized by a limitation upon Congress, touching commerce and navigation, and at the same time the agency of the treaty-authority was exerted in the extension of an obligatory law of nations, particularly directed to the freedom of neutral commerce.

The method of negotiation had aspects of really great consequence. Draft-forms of the pre-constitution treaties were prepared with great care by the committee of foreign affairs of the Continental Congress, a committee first known as the committee of foreign correspondence and its instructions were followed by the American plenipotentiaries abroad, perhaps the only serious departure from this rule being the exercise of individual discretion by Jay, Adams and the reluctant acquiescence of Franklin in the secret negotiation of a separate peace with Great Britain, it being known to them that both France and Spain were seeking to advance their own interests, to the prejudice of the young American nation. Under this practice and that of Washington's administration, to negotiate treaties "by and with advice and consent of the Senate," the United States possessed no grounds in international law or faith to decline to ratify treaties negotiated by the executive department or for their conditional or partial acceptance. When it became the custom to seek sanction of the Senate subsequent to the negotiation of treaties by the chief executive, the right of the Senate to reject, amend or reserve treaties was vigorously defended to save the constitutional provision from becoming an empty form and has ever since been sustained.

The treaty authority as granted to the Continental Congress, it will be noted, extended to the making of treaties and alliances.⁶

⁵55 Am. L. Rev. 68, 72.

The distinction is not observed with any uniformity by writers and commentators upon the constitution of the United States. An alliance is a union of interests, offensive or defensive; a league, coalition or federation which may be effected by compact or treaty between sovereign states. The Pinckney plan outlined the federal government as:

"A confederation between the free and independent states of . . . solemnly made uniting them together under one general superintending government for their common benefit and for their defense and security against all the designs and leagues that may be injurious to their interests and against all forc[e] and attacks offered to or made upon them."⁷

The authority to make alliances is a federative power.⁸ It is in that sense to be distinguished from a law-making power. Hamilton classified the treaty-power as an executive authority, "the force of law being annexed to the result," a power commensurate with all those objects to which the legislative power is extended which are the proper subjects of compact with foreign nations. But its application is wider: Mr. Justice Holmes declares:⁹ "It is obvious that there may be matters of the sharpest exigency for the national well being that an act of Congress could not deal with, but that a treaty followed by such an act could," as where a national interest can be protected in concert with another power. And it is to be observed that the chief executive shares here with the states, as equally represented in the Senate, something more than either a power to execute the laws or to make them: it is "a power which must belong to and somewhere reside in every civilized government,"¹⁰ a supreme attribute of sovereignty."¹¹

The constitution declared that no state shall "enter into any treaty, alliance or confederation,"¹² and in a subsequent clause of the same section, that no state shall "without the consent of

⁶The declaration of independence asserted the power of the free and independent states to "levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do."

⁷2 Farrand, Records of the Fed. Conv. 134.

⁸Locke, Two Treatises of Government, ch. xii, sec. 143, 144, 146.

⁹Missouri v. Holland, (1919) 252 U. S. 416, 433, 64 L. Ed. 641, 40 S. C. R. 382.

¹⁰Andrews v. Andrews, (1902) 188 U. S. 14, 33, 47 L. Ed. 366, 23 S. C. R. 237.

¹¹De Lima v. Bidwell, (1900) 182 U. S. 218, 45 L. Ed. 1041, 21 S. C. R. 743.

¹²Art. 1, sec. 10.

Congress . . . enter into any agreement or compact with another state, or with a foreign power." Here the words "alliance or confederation" are not used, so that the prohibition is absolute except as to agreements or compacts which may be made with the consent of Congress. This distinction is further emphasized by the fact that on Sept. 14, 1787, in the federal convention, the first mentioned clause was altered to read—"no state shall enter any *treaty alliance* or confederation."¹³ It is apparent that the prohibition upon states is absolute with respect to the entering upon a treaty alliance or confederation, but conditional with respect to agreements or compacts which are not treaties, alliances or confederations. With these limitations upon the power of the states in mind, it is important to consider how far the treaty-power as granted by the constitution is subject to necessary re-traint.¹⁴

The constitution provides only that the president shall have power "by and with the advice and consent of the Senate to make treaties,"¹⁵ provided that two-thirds of the senators present concur."¹⁶ Treaties of alliance were however within the contemplation of the convention. To the Senate was attributed in early drafts of the proposed constitution, the power to make treaties

¹³² Farrand, Records of the Fed. Conv. 619. "The first of these prohibitions, is absolute and unqualified, and completely excludes all power in the states to make treaties with foreign nations on any subject whatever." "The second prohibition forbids the states, without the consent of Congress, to enter into any agreement or compact 'with a foreign power.' The agreement or compact as here referred to, is not identical with a formal treaty, which is absolutely forbidden in the previous clause . . . The words mean any arrangement, negotiation, agreement, or compact with a foreign power, though it should not amount to a treaty in the strict sense. 1 Butler, Treaty-making Power of the U. S. 35 citing S. T. Spear. The author might have added "or which does not amount to an alliance or confederation."

¹⁴"It would not be pretended that under the confederation the powers of Congress to formulate 'treaties and alliances' were more extensive than those of the president and Senate under the constitution to form 'treaties,' " speech of Mr. Sedgwick, debate on Jay treaty, 4 Annals of Congress, col. 527.

¹⁵"In the constitution and laws of the United States, the word 'treaty' has no special meaning, different from the general definition." *Hauenstein v. Lynham*, (1879) 100 U. S. 483, 489, 25 L. Ed. 628. "The treaty is a contract of both parties," Marshall in *Meigs v. McClung's Lessee*, (1815) 9 Cranch (U. S.) 11, 3 L. Ed. 639, it "must contain the whole contract between the parties," *New York Indians v. United States*, (1898) 170 U. S. 1, 42 L. Ed. 927, 18 S. C. R. 531; *Fourteen Diamond Rings v. United States*, (1901) 183 U. S. 176, 46 L. Ed. 138, 22 S. C. R. 59. "Generally a treaty is defined to be a compact made between two or more independent nations with a view to public welfare." *Altman & Co. v. United States*, (1912) 224 U. S. 583, 600, 56 L. Ed. 894, 32 S. C. R. 593.

¹⁶Art. 2, sec. 2.

of commerce, of peace, and of alliance.¹⁷ Madison sought to lessen the difficulties of making treaties of peace,¹⁸ urged the inconvenience of requiring a legal ratification of treaties of alliance for the purposes of war¹⁹ and suggests consideration of whether "a distinction might be made between different sorts of treaties allowing the president and the Senate to make treaties eventual [contingent] and of alliance for limited terms and requiring the concurrence of the whole legislature in other treaties." May a distinction be made here as to the *authority* of the federal government to make alliances and to conclude treaties of limited alliance? Blackstone so differentiated: "It is also the King's prerogative to make treaties, leagues and alliances."²⁰ If, as he says, a league to be binding on the whole community must be made by the sovereign power, the treaty power in this federative capacity implies more than an authority constrained to constitutional guaranties, and a "plentitude of authority" which must contemplate a conjunction of expressly and impliedly granted sovereign powers as well as those residuary in the people, and the states, something not apparent in the grant to the president and Senate to make treaties, as distinguished from alliances, which is essentially a derivative authority of the powers of war and peace. There is then at common law a distinction between an act of unlimited sovereign power and the authority of the United States to make treaties, and "the nature and extent of the authority granted by the constitution must in the absence of positive law be governed exclusively by the common law."²¹

Article 6 of the constitution²² declares that "this constitution, and the laws made in pursuance thereof; and all treaties made or which shall be made under the authority of the United States shall be the supreme law of the land." Mr. Justice Holmes has recently raised the question²³ whether there is any other test under American law of the validity of a treaty than the formal requisities for concluding it, implying that significance might

¹⁷² Farrand, Records of the Fed. Conv. 144-5, 155.

¹⁸² Farrand, Records of the Fed. Conv. 540.

¹⁹² Farrand, Records of the Fed. Conv. 392.

²⁰¹ Blackstone, Commentaries 257.

²¹United States v. Coolidge, (1813) 1 Gall. (C.C.) 488, Fed. Cas. No. 14,857; Blackstone, Commentaries par. 158, par. 798, par. 1645.

²²Marshall, in Cohens v. Virginia, (1821) 6 Wheat. (U. S.) 264, 381, 5 L. Ed. 285, declares "this is the authoritative language of the American people, and if gentlemen please, of the American states."

²³Missouri v. Holland, (1919) 252 U. S. 416, 64 L. Ed. 641, 40 S. C. R. 382.

attach to the declaration in the constitution that treaties are "the supreme law of the land" when made "under the authority of the United States,"²⁴ while acts of Congress are similarly honored only when made in pursuance of the constitution.²⁵ The vari-

²⁴Debate on Jay treaty, House of Representatives, March 1796, Annals of Congress, IV, 1st sess. Col. 450, 451, Mr. Heath: "Great stress is laid upon the constitution declaring treaties laws of the land. (. . . quot. art. 6, sec. 2.) Hence it is obvious that the supremacy of the law is over the constitution and laws of the separate states, which was necessary to prevent these interfering with those. But it does not affect the powers of this House, as a component part of the Gen. Legislature, *and the authority of the United States*. It is also worth while to notice the gradation in this article . . . How absurd the doctrine then, that these last (treaties), third in order, can repeal the second (laws). At that rate, all power whatever, would remain vested in two branches of the government; the third with all its powers of originating bills for raising revenues would be dwindled into a mere board of assessors. If neither of the powers ought to possess, directly or indirectly, an overruling influence over others, whence is the power to be deduced of the president and states by treaty, to make laws possessing this very overruling influence over this House? Gallatin urged: "The clause by no means expresses that treaties are equal or superior to laws of the Union, or that they shall be supreme law when clashing with any of them." (Col. 469). Madison (Col. 488.) observed: "On comparing the several passages in the constitution, which has been already cited to the committee, it appeared that if taken literally, and without limit, they must necessarily clash with each other. Certain powers to regulate commerce, to declare war, to raise armies, to borrow money, etc., are first especially vested in Congress. The power of making treaties which may relate to the same subjects, is afterwards vested in the president, and two thirds of the Senate; and it is declared, etc., (Art. 6). . . . The term *supreme* as applied to treaties, evidently meant a supremacy over the state constitutions and the laws, and not over the constitution and laws of the United States. And it was observable, that the judicial authority and the existing laws, alone of the states, fell within the supremacy expressly enjoined. The injunction was not extended to the legislative authority of the states or to laws requisite to be passed by the states for giving effect to treaties; . . . etc. Mr. Bourne observed: "Laws contrary to the constitution are nugatory, and treaties contrary to existing laws, the same; because when in that stage, they are not concluded under the authority of the United States, (and there is no longer any clashing) (Supra. Col. 578) Mr. Hillhouse declared (Col. 669): "Great stress has been laid on the words, under the authority of the United States, and in the sixth article, which declares etc. . . . as importing something more than what could be done by the president and Senate, and as pointing to the legislative powers of Congress; a little attention to the subject will show that those words are not used in that place for the purpose of limitation, but as descriptive of the kind of treaties intended. Under the confederation, the states had reserved a right, with the consent of Congress, to make treaties; it would not have done, therefore, to have used the word "treaties" only, for that might have included other treaties than those made by the United States. The Continental Congress would not answer; for that would have excluded treaties made under this government; it would not have done to have used the words president and Senate; that would have excluded treaties made by the old Congress. The words "*under the authority of the United States*," are the only words that could give a definite and concise description of the treaties intended. It will be well to inquire where is the authority in the United States. Not in Congress, but in the people."

ance in the words descriptive of laws and treaties is not entirely satisfactorily accounted for by Rawle²⁶ as designed to include within the sanction of the constitution at the time of its adoption those treaties already in existence which had been made by Congress under the confederation, the continuing obligation of which it was proper to declare:²⁷

"The words 'under the authority of the United States' were considered as extending equally to [those] treaties previously made and to those which should subsequently be effected, but although the former could not be considered as pursuant to a constitution which was not then in existence, the latter would not be 'under the authority of the United States' unless they are conformable to its constitution."

The authority of the United States is thus seen to have been retroactive; it assimilated prior contracts or compacts of the United States to the supreme obligation of law under the newly framed constitution. The federal convention at one stage adopted the clause:

"This constitution and the laws of the United States made in pursuance thereof and all treaties *made* under the authority of the United States shall be the supreme law of the several states and of their citizens and inhabitants."²⁸

As first considered this clause read:

"That the legislative acts of the United States made by virtue and in pursuance of the articles of union, and all treaties *made and ratified* under the authority of the United States shall be the

²⁵Iredell in Debates in North Carolina Convention: "When treaties are made they become as valid as legislative acts. I apprehend that every act of the government, legislative or executive is good if in pursuance of a Constitutional power and the law of the land;" see also 4 Annals of Congress, Debate on Jay Treaty. This appears to have been the opinion of Jay, as communicated by letter to the Congress of the confederation, 1788.

²⁶Rawle, Constitution 66.

²⁷The Supreme Court of the United States, Judge Chase speaking, declared in *Ware v. Hylton*, (1796) 3 Dall. (U. S.) 199, 1 L. Ed. 568; "Four things are apparent on a view of this sixth article of the national constitution. First: That it is retrospective, and is to be considered in the same light as if the constitution had been established before the making of the treaty of 1783. Second: That the constitution or laws of any of the states so far as either of them shall be found contrary to that treaty are prostrated before the treaty.. Third: That consequently the treaty of 1783 has superior power to the legislature of any state, because no legislature of any state has any kind of power over the constitution which was its creator. Fourth: That it is the declared duty of the state judges to determine any constitution or laws of any state contrary to that treaty, or any other, made under the authority of the United States, null and void. National or federal judges are bound by duty and oath to the same conduct."

²⁸2 Farrand, Records of the Fed. Conv. 417, 572.

supreme law of the respective states, so far as those acts or treaties shall relate to the said states or their citizens and inhabitants."

It has been held that there are inherent limitations upon the authority of the United States to make treaties;²⁹ that the treaty power, as a delegated authority "cannot alter the constituting power;" "on natural principles a treaty which would manifestly betray and sacrifice the private interest of the state would be null;³⁰ nothing can be done by the treaty-making power . . . which robs a department of the government, or of any of the states, of its constitutional authority;³¹ it is limited by all the provisions of the constitution which inhibit certain acts from being done by the government or any of its departments of which description there are many,"³² "though the power is general and restricted," says Story, "it is not to be so construed as to destroy the fundamental laws of the state."³³ As affirmatively expressed by the Supreme Court of the United States:^{33a} "It is impossible to conceive that where conditions are brought about to which any particular provision of the constitution applies, its controlling influence may be frustrated by the action of any or all the departments of government;" even where there is no direct command of the constitution which applies, "there may nevertheless be restrictions of so fundamental a nature that cannot be transgressed although not expressed in so many words of the constitution . . . In the nature of things, limitations of this character cannot be transcended, because of the complete absence of

²⁹Gallatin based the limitation upon the authority to make treaties in all limited governments upon the law of nations:

"The law of nations, the practice under the articles of confederation, the opinions of individuals, and of conventions, had been conjured up as uniting in ascribing to the powers of making treaties the most unlimited and unbounded effect. . . . in all limited governments, where the powers of making treaties and laws were lodged in different hands, the first never had, *by its nature*, swallowed up and absorbed the legislative; but it would be found universally that the manner in which that power was exercised in such governments, when the conditions of the compact with the foreign nation were of a legislative nature, was, not by superseding, but only by calling to its aid and assistance the legislature, without whose consent the executive was not enabled to fulfill the conditions of the compact, and secondly this doctrine was perfectly well understood, as he stated it, by all nations, and therefore constituted a part of the law of nations. Vattel, book I, Chap. 21, Book II, Chap. 14, Book IV; 2; Debate on Jay Treaty; 4 Annals of Congress, 1796, Col. 727.

³⁰Hamilton, Camillus Papers no. 35, 5 Hamilton's Works, Lodge Ed. 301.

³¹Cooley, Constitutional Limitations 117.

³²Calhoun, see Tucker, Limitations on Treaty-Making Power.

³³Story, Commentaries art. 1508.

^{33a}Downes v. Bidwell, (1900) 182 U. S. 244, 45 L. Ed. 1088, 21 S. C. R. 770.

power." "A treaty cannot change the constitution or be held valid if in violation of that instrument."⁸⁴

A test then of the validity of a treaty is its conformity to expressed or implied constitutional limitations; but this is not the sole measure of the validity of treaties. Another, very material to their obligation as the supreme law of the land, as well as to that of their legislative abrogation, is their conformity to, or constructive operation as the law of nations. It was urged before the North Carolina Convention, July 28, 1778⁸⁵ and the view is consonant with authority that "although treaties are mere conventional acts between nations, yet by the law of nations, they are the supreme law of the land to their respective citizens or subjects." In a debate on the Jay treaty, March, 1796, House of Representatives, Mr. Harper declared:

"A distinction here ought to be observed between the law of nations and municipal law. The former is the province of treaties, the latter of the legislative power . . . In all subjects, then, relative to the law of nations, to matters external, to the conduct of nations towards each other, treaties are laws and produce immediately and indirectly the effect of laws."⁸⁶

The distinction is material and emphasizes at this time the abandonment of "the higher ground that commercial treaties were not when ratified the supreme law of the land."⁸⁷ Marshall had urged in the debates in the Virginia Legislature that the Jay treaty in all its commercial parts was still under the power of the House of Representatives.

In the debate in 1796 on the Jay treaty, the eighteen articles, succeeding the first ten, having for their manifest object the regulation of "external commerce and navigation,"⁸⁸ the question was as to the power of the House of Representatives in respect to commercial treaties made by the president and Senate. It was admitted that the House had not right to make treaties, however debatable was the treaty power in reference to regulation of commerce; and it was questioned whether the discretion of the House to judge with respect to effecting such treaties did not in effect imply an instrumentality in the making of such compacts.⁸⁹

⁸⁴Downes v. Bidwell, (1900) 182 U. S. 244, 287, 45 L. Ed. 1088, 21 S. C. R. 770; see also Geofroy v. Riggs, (1889) 133 U. S. 258, 33 L. Ed. 642, 10 S. C. R. 295.

⁸⁵Elliot's Debates 119-144.

⁸⁶Annals of the Fourth Congress, 1st Sess., 1795-96.

⁸⁷Story, Miscellaneous Writings 193.

⁸⁸Hamilton's Works, Lodge Ed. 475.

⁸⁹Annals of Congress, 4th Congress, 1st Sess., Col. 454.

Gallatin defined an unconstitutional treaty to be one providing for the doing of that, forbidden by the constitution, and urged that if a "treaty embraces objects within the sphere of the general powers delegated to the federal government, but which have been exclusively granted to a particular branch of government, say to the legislative department, though not unconstitutional, it does not become the law of the land until it has obtained the sanction of that branch."⁴⁰ On the other hand the contention was that the treaty-making power was an authority paramount to the legislative power, and that the positive institutions of the Legislature must give place to compact; that the very object of the treaty power was to remove by contract with foreign nations, those legislative impediments which embarrass that intercourse, the argument being that the people could repeal laws made by one agency quite properly by another. One member observed that there had been no explicit determination of the sense in which treaties ought to be considered the supreme law of the land. Madison admits it is uniformly agreed that sovereignty resides in the people and defines the question as referring to the manner in which the will of the people had divided the powers delegated, and the construction that would best reconcile the several parts of the constitution with each other, and be most consistent with its general spirit and object. He thought the treaty power too greatly narrowed if it be regarded as moving in a separate orbit from the legislative authority; that it was impracticable to regard the former as a concurrent power with the latter; since "a treaty of commerce would rarely be made that would not trench

⁴⁰"The general power of making treaties, undefined as it is by the clause which grants it, may be either expressly *limited* by some other positive clauses of the constitution, or it may be *checked* by some powers vested in other branches of the government, which although not diminishing, may control the treaty-making power The treaty-making power is limited by the constitution when in the first section it is said that ALL legislative power is granted to Congress Shall a treaty repeal a law or a law a treaty? Neither can a law repeal a treaty, because a treaty is made with the concurrence of another party—a foreign nation—that has no participation in framing the law; nor can a treaty made by the president and Senate, repeal a law, for the same reason, because the House of Representatives have a participation in making the law. It is a sound maxim of government that it requires the same power to repeal a law that enacted it. If so, then it follows that laws and treaties are not of the same nature; that both operate as the law of the land, but under certain limitations; both are subject to the control of the constitution; they are made not only by different powers, but those powers are distributed, under different modifications, among the several branches of the government. Thus no law could be made by the legislature giving themselves power to execute it, and no treaty by the executive embracing objects specifically assigned to the legislature without their assent."

on existing legal regulations as well as be a bar to future ones;" that to regard each of them as supreme over the latter involved the "absurdity of an imperium in imperio," of two powers both supreme, yet each of them liable to be superseded by the other, likening the case to the conflict of laws between the comitia curiata and the comitia tributa of Roman days; he urges with great finality that to regard the treaty power as both unlimited in its objects and completely paramount in its authority would be to give it a latitude necessarily prohibited by regard to the general form and fundamental principles of the constitution. It may be observed that so far as the law of nations, the universal sanction and usage of civilized nations, consists with the constitution, treaties affirming the understandings thereof, would not, if admitted to be of paramount obligation, infringe the constitution or delegated authorities. Madison finally submits the power of Congress may be viewed as coöperative with the treaty power on the legislative subjects submitted to Congress by the constitution, favoring the view of Mr. Gallatin, a view not inconsistent with the principle that no statute of one or two nations can change the law of nations. That the treaty power embraced all subjects arising under the law of nations, and for the mutual protection of the citizens in their correspondence with each other was admitted, but it was pointed out that the law of nations admitted causes which would justify a nation in departing from, or refusing to execute treaties; and that Congress in their legislative capacity were judges of those causes.⁴¹

Marshall in *Foster v. Neilson*⁴² held that "our constitution declares a treaty to be a law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of legislature, whenever it operates of itself, without the aid of any legislative provision." Mr. Justice Baldwin in *Pollard v. Kibbe*⁴³ comments upon Marshall's opinion and declares in a concurring opinion that it was silent on the law of nations as in former adjudications; yet it will not be pretended that it was meant to controvert or abrogate those principles which are consecrated by "the usage of the civilized world." The significance of this qualification is seen when the power of Congress to abridge the law of nations is considered, and the inference is unavoidable in Mar-

⁴¹Hillhouse, Annals of Congress, 4th Congress, 1st Sess. Col. 669.

⁴²(1829) 2 Pet. (U. S.) 253, 314, 7 L. Ed. 415.

⁴³(1840) 14 Pet. (U. S.) 353, 402, 10 L. Ed. 490.

shall's opinion in *United States v. Percheman*⁴⁴ that it was the rule of the "universally received doctrine of nations" entering into the Florida Cession treaty which gave it executed obligation. In *Taylor v. Morton*⁴⁵ the "necessary prerogative of a nation" to abrogate treaties constituting municipal law of the United States is asserted to remain in Congress "*whenever* they relate to subjects which the constitution has placed under the legislative power," of which the law of nations is not one. This opinion is reflected in that of the Supreme Court⁴⁶ wherein Mr. Justice Field holds:

"If a treaty operates by its own force and relates to a subject within the power of Congress it can be deemed *in that particular only* the equivalent of a legislative act to be repealed or modified at the pleasure of Congress."

The obligation of treaties as municipal law by the constitution must then be distinguished from their obligations under the general law of nations.

This distinction is not taken in the *Head Money Cases*⁴⁷ where it was held that:

"So far as a treaty made by the United States with any foreign nation can be the subject of cognizance in the courts of the United States, it will be subject to such acts as Congress may pass for its enforcement, modification, or repeal."

So reiterated the Supreme Court in *Whitney v. Robertson*.⁴⁸ Thus the doctrine has grown up without express qualification that: "A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty."⁴⁹ But the Supreme Court has declared that acts of Congress are to be construed "in the light of the purpose of the government to act within the limitations of international law;"⁵⁰ that "no statute of one or two nations can create obligations for the world;"⁵¹ and as the principle is as controlling today as when the constitution

⁴⁴(1833) 7 Pet. (U. S.) 51, 88, 8 L. Ed. 604.

⁴⁵(1855) 2 Curtis (C. C.) 454, 459, Fed. Cas. No. 13, 799.

⁴⁶*Chae Chan Ping v. United States*, (1888) 130 U. S. 581, 32 L. Ed. 1068, 9 S. C. R. 623.

⁴⁷(1884) 112 U. S. 580, 28 L. Ed. 798, 5 S. C. R. 247.

⁴⁸(1887) 124 U. S. 190, 31 L. Ed. 386, 8 S. C. R. 456.

⁴⁹*Shiras*, 169, 271.

⁵⁰*MacLeod v. United States* (1912) 229 U. S. 416, 57 L. Ed. 1260, 33 S. C. R. 955.

⁵¹*The Scotia*, (1871) 14 Wall. (U. S.) 170, 187, 20 L. Ed. 822; *The Paquette Habana*, (1900) 175 U. S. 677, 711, 44 L. Ed. 320, 20 S. C. R. 290; *In re petition of the Long Island North Shore Passenger & Freight Transportation Co.*, (1881) 5 Fed. 599, 622.

was framed that: "The municipal laws of a country cannot change the law of nations so as to bind the subjects of another nation."⁵²

A distinction is unavoidable between the mere authority to make and ratify treaties and the authority to give to treaties paramount legal obligation consistent alike with the constitution and with international law. It is not sufficient to rest this distinction on that between executory and executed treaties;⁵³ nor between contractual treaties and treaties forming an international legal order. As between executed and executory treaties, that the former may be repealed as other federal enactments⁵⁴ they must not only be effective without aid of Congress or the executive or judicial department, but must touch the subject matter of the legislative power of the United States; and it is apparent that though of executed obligation in the sense that they constitute enforceable municipal law, such treaties may nevertheless contribute to an international legal order and so become of paramount authority under the constitution and the American doctrine of international law. Marshall held:⁵⁵

"An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains, and consequently can never be construed to violate neutral *rights*, or to affect neutral commerce further than is warranted by the law of nations *as understood in this country*."

Insofar as the treaty power transcends the domestic purposes of ordinary legislation, its means are characterized by the contraction of permanent obligations of general effect.⁵⁶ Marshall has refused to admit a construction of the constitution, with relation to the binding force of the accepted usages of nations at the time the constitution was framed which would fetter the war time powers of Congress or its discretion as to the making of reprisals; but this view is subject to his opinion in *United States v. Percheman* if not reversed by this decision, according to Professor John Bassett Moore.⁵⁷ That a general right derived under the constitution "by the rigor of the law of nations and the common law,"⁵⁸ is restrained by the modern usage of

⁵²Miller v. Ship Resolution, (1781) 2 Dall. 1, 4, 11 L. Ed. 263.

⁵³10 Am. Jnl. of Int. Law 706, 717.

⁵⁴Ware v. Hylton, (1796) 3 Lall. (U. S.) 199, 1 L. Ed. 568.

⁵⁵The Charming Betsy, (1804) 2 Cranch (U. S.) 64, 118, 2 L. Ed. 208.

⁵⁶Federalist No. 75; 13 Am. Jnl. of Int. Law 64.

⁵⁷Brown v. United States, (1814) 8 Cranch (U. S.) 110, 125, 3 L. Ed. 504. See Dillon's Marshall Vol. I, p. 526.

⁵⁸Brown v. United States, (1814) 8 Cranch (U. S.) 110, 143, 3 L. Ed. 504.

nations rests in proof, declared Story, anticipating Marshall's final opinion by twenty years, that, "by the general consent of nations" the usage asserted has become incorporated into the code of public law. Thus the modern usage or law of nations "is resorted to merely as a limitation upon this discretion, not as conferring the authority to exercise it."⁶⁰ It is a nice question how far the modern usage of nations, as recognized by the constitution⁶¹ or established and made of binding force by treaties of the United States, constrains necessarily "independent substantive power" arising from the nature of sovereignty and of the government of the United States. Marshall in *Gibbons v. Ogden*⁶² holds the commerce power "like all others vested in Congress" to be complete in itself. "It may," he says, "be exercised to its utmost extent and acknowledges no limitations other than are prescribed in the constitution." But Marshall, himself,⁶³ declares the law of nations to be part of the law of the land, and is the expositor of its restraining influence upon statutes of Congress. The wisdom and unfettered discretion of Congress are relied upon to secure the people from the abuse of power, only in matters upon which there is no such limitation in the constitution. Story urged that if the doctrines of the British navigation laws formed "a part of the law of nations, however mischievous," the United States must submit until they should be relaxed by "particular convention."⁶⁴ It is apparent then in the view of this great justice and commentator upon the constitution, that treaties modifying the rules or the usage or law of nations were paramount in authority to federal statutory enactment: "I hold, with Bynkershoek (Quaest. Pub. Jur. Ch. 7.) that where such treaties exist they must be observed."⁶⁵ Mr. Justice Field in *Chae Chan Ping v. United States*⁶⁶ asserts:

"By the constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other;" but he adds: "It will

⁶⁰*Brown v. United States*, (1814) 8 Cranch (U. S.) 110, 139, 3 L. Ed. 504.

⁶¹*Brown v. United States*, (1814) 8 Cranch (U. S.) 110, 154, 3 L. Ed. 504.

⁶²*Murray v. Chicago, etc., Ry. Co.*, (1899) 92 Fed. 868.

⁶³(1824) 9 Wheat. (U. S.) 1, 6 L. Ed. 23. See limitation referred to in *The Brigg Wilson*, 1820. p. 428, 436, 438.

⁶⁴*The Nereide*, (1815) 9 Cranch (U. S.) 388, 423, 3 L. Ed. 769.

⁶⁵Story, *Miscellaneous Writings*, 485.

⁶⁶*Brown v. United States*, (1814) 8 Cranch (U.S.) 110, 142.

⁶⁷(1888) 130 U. S. 581, 599, 32 L. Ed. 1068, 9 S. C. R. 623.

not be presumed that the legislative department of the government will likely pass laws which are in conflict with the treaties of the country."

His claim is that of *rebus sic stantibus*: changed circumstances justifying the disregard of treaty stipulations or unavoidable change in foreign policy.⁶⁷

The early American treaties embraced with commercial objects, stipulations relative to offenses against the laws of nations,⁶⁸ agreements relative to cases during the war, free bottoms, contraband, rights of war, all of which appear to have been regarded as within the sphere of legislative power. It should also be considered that the treaty power was exercised in an entirety by Congress, during the confederation, and that the legislative will, in consenting, through treaties of the United States to international regulations of commerce and neutral right was in respect to many of these provisions submitting the future exercise of its discretion to a paramount law, which was plainly within the contemplation of the constitution. This is apparent from contemporaneous opinion. Hamilton writes:

"That treaty stipulations, which are designed to operate in case of war, preserve their force and obligation when war takes place;"⁶⁹ "our treaties and the law of nations form a part of the

⁶⁷Moore comments on this decision: "It was admitted that the act was violative of treaties, but it was held that it was within the power of Congress to exclude aliens from the United States, even though a treaty had guaranteed them the right to come here and reside; and to this extent it was held that treaties were abrogated. It was not held, as many have seemed to suppose that a nation may at will rid itself of the obligation of treaties by abrogating them."

⁶⁸"Offences against the law of nations . . . cannot with any accuracy be said to be completely ascertained and defined in any public code recognized by the *common consent of nations*" . . . It is obvious that this power has an intimate connection and relation with the power to regulate commerce and intercourse with foreign nations, and the rights and duties of the national government in peace and war, *arising out of the law of nations*. As the United States are responsible to foreign nations for all violations of the law of nations, etc. . . Congress ought to possess the power . . . Story, Commentaries, par. 1163, 1165; 1. Tucker's Blackstone, Comm. App. 268, 9; Rawle, Const. ch. 9 p. 108. Iredell declared that offenses against the law of nations "must come within the sphere of Legislative authority which is intrusted with their protection." Ford, Pamphlets on the Const. 359.

⁶⁹5 Hamilton's Works, Lodge Ed. 126. "We think . . . that treaties stipulating for permanent rights and general arrangements and professing to aim at perpetuity, and to deal with the case of war as of peace do not cease on the occurrence of war, but are at most, only suspended while it lasts; and unless they are waived by the parties, or new or repugnant stipulations are made, they revive in their operation at the return of peace." *Society for the Propagation of the Gospel v. New Haven*, (1823) 8 Wheat. (U. S.) 464, 494, 5 L. Ed. 622.

law of the land;"⁷⁰ "an established rule of the law of nations can only be altered by agreements between *all* the civilized powers or by a new usage generally adopted and sanctioned by time;"⁷¹ "no one nation can make a law of nations."⁷²

Again he argued that the treaty with Sweden of 1783 "abridged the exercise of the legislative power to regulate trade . . . restraining the legislative power from extending prohibitions to them, which shall not equally extend to other nations the most favored."⁷³ Jefferson urged that the treaty of 1807 tied the hands of the United States to retaliate by legislating non-importation or non-intercourse."⁷⁴ Washington queries: "What are the advantages of treaties if they are to be observed no longer than convenient?"⁷⁵ Jay urges that: "No nation can have authority to vacate or modify treaties at pleasure."⁷⁶ Jay distinguishes between treaty contracts and the legislative power which has no foreign extra-territorial obligation.

We have under the practice of the American government, not only the phenomena of statutes and treaties operative in the same field but that of legislative compacts with foreign nations, accomplishing that which the treaty power has failed to accomplish. A notable case is exemplified in the repeal of the non-intercourse law of 1809 in response to the promise of France to conclude "*every species of convention*" tending to renew the treaty of commerce with America, etc., if American vessels would not submit to the British orders in council of 1807; but providing for the revival of certain sections should England or France continue their depredations upon American commerce. There was in this and other instances, complete coöperation between the executive and the legislative branches. It is a significant fact that our commercial relations with foreign powers rest today in no small degree upon a legislative basis. Comparatively recent instances are to be found in the tariff acts of 1890 and 1897 authorizing

⁷⁰ Hamilton's Works, Lodge Ed. 146, Pacificus.

⁷¹ Hamilton's Works, Lodge Ed. 218.

⁷² Hamilton's Works, Lodge Ed. 258.

⁷³ "The words: 'the most favored nation' used in all the treaties between the United States and foreign nations in amity with them, have never been interpreted to found a jurisdiction exclusive of or inconsistent with the laws of the United States in our own ports." *The St. Olaf*, 2 Pet. Adm. 428, Fed. Cas. No. 17,790.

⁷⁴ Jefferson's Works, Ford Ed. 36.

⁷⁵ Message to Senate, November 19, 1794. 12 Sparks 491.

⁷⁶ Charge to Grand Jury, (1793) Fed. Cas. No. 6,360.

⁷⁷ Washburn, 55 Am. L. Rev. 68.

the executive agreements with foreign nations in respect to reciprocity of duties. The competency of Congress to enact the terms of compacts in such cases with foreign nations is not denied. The legislation is contingent and the compact is obviously unilateral in character.

"The real trouble of the law-making branch of the government in dealing with foreign nations is not . . . a matter of constitutional incompetence . . . ; it grows rather out of certain limitations, which are as inherent as they are obvious."⁷⁸

The difficulty, as to conflict between the treaty authority and the legislative power is more apparent in the case of a treaty of guaranty and arbitration, a form of treaty which is of instant interest, than in the case of treaties of commerce and navigation. Thus it has been held that the guaranties under the Panama treaty of 1903⁷⁹ virtually bind the United States to a declaration of war in certain contingencies.⁸⁰ The so-called Bryan peace treaties stipulate for a year of grace before commencing war.⁸¹ Chief Justice Taft has distinguished⁸² the treaty power:

"Creates the obligation to declare war, or to refrain from so doing in certain contingencies. That obligation is to be discharged by Congress under its constitutional power to declare war. If it fails to do so, and thus comply with the *binding obligation* created by the treaty-making power, then it merely breaks the contract of the government."

This is an admission that the authority of the United States to make treaties is inadequate to restrain the exercise of the inherent substantive power of Congress. Does it further infer that, within the sphere of Congressional authority, the treaty authority may not engraft upon the law of nations new and great principles of the law of nations having paramount obligation over statutes of the United States? Is it to be implied that there is a class of government contracts which Congress may invalidate under the constitution or that such treaties are only conditional agreements? The Hon. Charles E. Hughes takes a somewhat different view of this question:

⁷⁸Ibid.

⁷⁹Art. 1.

⁸⁰Madison objects to giving paramount legislative authority to treaties since the United States under such a doctrine might "by means of an alliance with a foreign power be driven into a state of war by the president and senate, contrary both to the sense of the legislature, and to the letter and the spirit of the constitution. Debate on Jay treaty, 1796. 4 Annals of Congress col 5 and 6.

⁸¹12 Am. Jnl. of Int. Law 75.

⁸²May 26, 1916, before the League to Enforce Peace.

"Congress alone has the power to declare war and any agreement made by the United States to cooperate in coercive measures amounting to war would necessarily be subject to the exercise by Congress of its unquestioned authority. But this does not mean that the treaty-making power may not, if it is found to accord with national interests and policies, aid in forming an international organization believed to be necessary and practicable, although its offer of cooperation in any given contingency must be subject to the well known conditions which inhere in our constitutional form of government. Congress, indeed, will have all its powers, but its course of action will depend upon the world outlook of the nation. . . ."

But the powers of Congress in war as in peace respond to the rules of the laws of nations. Treaties which commit the government of the United States to territorial guaranties or to arbitration with its necessary limitations upon the war powers of Congress, must refer themselves to the definite obligations of the government of the United States under international law, to which the war and peace authorities of the legislative branch of the government are necessarily constrained. In this light alone can it be admitted that a treaty agreement to cooperate in coercive measures amounting to war would as the supreme law of the land obligate the executive branch of the government until Congress had legislated either to fulfil the treaty or to repeal it. Then mere failure of Congress to act would not necessarily break such an agreement; on the other hand, if the treaty should not conform to the law of nations in respect to its commitments to make law, express or implied, or its guaranties to refrain therefrom, jointly or severally, the failure of Congress to act would in reality be its tacit recognition of the unconstitutionality of the treaty. It is obvious that there are powers of Congress, subject to the law of nations, quite distinct from its powers to deal with questions which under the constitution, or "in the light of international law" are purely of domestic jurisdiction; and further that not only is the war power, but the authority to regulate commerce and navigation as well, constrained to the observance of the law of nations.⁸³ These observations, however cursory, emphasize the principle that not only is the validity of a treaty made by authority of the United States to be determined

⁸³"No single nation can change the law of the sea," *The Scotia*, (1871) 14 Wall. (U. S.) 170, 187, 20 L. Ed. 822. "The constitution itself adopted and established as part of the laws of the United States approved rules of the general maritime law." *Knickerbocker Ice Co. v. Stewart*, (1919) 253, U. S. 149, 64 L. Ed. 83, 40 S. C. R. 438.

by "evidence, internal and external, according to the rules and maxims of the laws of nations relative to such cases,"⁸⁴ but that the binding force of the treaty, as of an international contract, upon Congress, is to be determined by its conformity to those principles of international law which have achieved the high sanction of the universal consent of nations.⁸⁵ Gallatin declared:

"If the treaty-making power is not limited by existing laws, or if it repeals laws that clash with it, or if the legislature is obliged to repeal the laws so clashing, then, the legislative power in fact resides in the president and Senate and they can pass any law under color of treaty."

Mr. Adams writes:⁸⁷ "The argument is irresistible: it has never been answered." A century has elapsed; "Whatever may be the national effect of a treaty which conflicts with the provisions of the constitution, it is generally admitted that it will be disregarded by the courts;"⁸⁸ the same must be held of a treaty in derogation of the law of nations. "By the general law of nations we certainly are bound."⁸⁹

The distinction between executive agreements of an international character and treaties is one of no inconsiderable importance. Neither has the constitutional power of the chief executive to conclude such conventions, been at all clearly delimited when one reviews subsisting authorities.

A notable precedent, interesting because of its bearing on the Disarmament Conference, is the agreement of 1817 for the limitation of naval forces on the Great Lakes, made and carried into effect by the executive, though afterward submitted to the

⁸⁴Correspondence and Public Papers of John Jay, April 14, 1806.

⁸⁵In *Davis v. Concordia*, (1850) 9 How. U. S. 280, 294, 13 L. Ed. 138, it was held by the Supreme Court that "the law of nations does not recognize in a nation ceding territory the continuance of supreme power over it after the treaty has been signed or any other exercise or sovereignty than that which is necessary for social order and common purposes . . . that if such sovereignty could be exercised after a treaty had been signed, it would be a power to change materially the relations which the people of a ceded territory had to each other; and to establish between them and a new sovereign a different condition than had been contemplated when they were transferred." The rule "accords with the received usages of nations in respect of rights acquired under treaties." This indicates that the obligation of a treaty of session is to be referred to the law of nations.

⁸⁶March 10, 1796 in the House of Representatives, speech on Jay treaty.

⁸⁷Life of Gallatin, 161.

⁸⁸29 Harv. L. Rev. 219; *Doe v. Braden*, (1853) 16 How. (U. S.) 635, 657, 14 L. Ed. 1090.

⁸⁹*Peters in Thompson et al. v. Ship Catharina*, (1795) 1 Pet. Adm. 104, Fed. Cas. No. 13,949.

senate.⁹⁰ Another case of more than immediate interest is to be found in the protocol concluded at Peking, Sept. 7, 1901, between China and the allied and associated powers, subsequent to the Boxer uprising. Temporary working arrangements in the matter of *modus vivendi* agreements are likewise regarded as within the powers of the president pending action by the treaty-making authority. Another distinct class of executive agreements is recognized where the authority is derived from Congressional enactment.

"It is a peculiarity of these agreements that so long as the statute under which they are concluded stands unrepealed, they have precisely the same force as treaties, being in effect laws of the land."⁹¹

It has been urged that the treaty-making power is not, however, delegated in this class of cases to the president but "that though every treaty is an agreement, every agreement is not a treaty."⁹² When authorized by enactment of Congress, negotiated and proclaimed under the authority of the president, the Supreme Court holds "such a compact is a treaty."⁹³ Constitutional limitations upon the authority of Congress with reference to change in the accepted law of nations must extend to this class of joint legislative and executive agreements.

Admitting that "no person acquires a right to the continued operation of a treaty"⁹⁴ the fact remains that the security of public or private right under the constitution, laws and treaties of the United States and very especially under the law of nations is the implied condition in the legislative abrogation of the international contracts of this government. This is the basis upon which is founded all national or private reclamations under treaties, the principle of equitable indemnification for violation of treaty rights or those given by the law of nations, and consists with the American doctrine that the law of nations and not the purely municipal law of the country is the measure of its obligation to other nations.

⁹⁰Moore, *Treaties and Executive Agreements*, 20 Pol. Sci. Q. 390; see also 5 Moore, *In. Dig.* 169, Report of Mr. Foster, Secretary of State.

⁹¹*Ibid.*

⁹²19 Harv. L. Rev. 69.

⁹³*B. Altman & Co. v. United States*, (1911) 224 U. S. 583, 600, 56 L. Ed. 894, 32 S. C. R. 593.

⁹⁴*Rainey v. United States*, (1913) 232 U. S. 310, 58 L. Ed. 617, 34 S. C. R. 429.